Supreme Court, U.S.
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No. 86-855

IN THE

Supreme Court of the United States

October Term, 1986

EARL D. JACOBSEN and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Liquidation and Dissolution of Saratoga Distributing Company, and Ribbon Distributing, Inc.,

Petitioners,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Because the decision below[1] answered a certified question, the specific question before the Minnesota Supreme Court, and thus presented to this Court for review, is:

> Does the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§ 325B.01, *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15, unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement under art. I, § 10 of the Constitution of the United States and art 1, § 11 of the Constitution of the State of Minnesota?

The Petitioners expressly consented to the specific terms of the certified question.[2]

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[1] *Jacobsen v. Anheuser-Busch, Incorporated*, 392 N.W.2d 868 (Minn. 1986) ("decision below").

[2] Order and Consent as to Form, dated September 17, 1985. (Respondent's Supplemental Appendix ("Resp. Supp. App."), page Supp. A-1).

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Rule 28.1 Statement: Respondent Anheuser-Busch, Inc. is a wholly-owned subsidiary of Anheuser-Busch Companies, a Delaware corporation. Anheuser-Busch Companies, through a wholly-owned subsidiary, owns a majority of stock in Exploration Cruise Lines, Inc., a Delaware corporation. Anheuser-Busch Companies is a partner in International Label Company, a New York partnership.

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IN THE

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EARL D. JACOBSEN and ERNEST JACOBSEN,
Individually and as Co-Trustees under Voluntary Liquidation and Dissolution of Saratoga Distributing Company, and Ribbon Distributing, Inc.,

Petitioners,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 10:

> No state shall . . . pass any . . . law impairing the obligation of contracts . . .

Minnesota Constitution, Article 1, Section 11:

> No . . . law impairing the obligation of contracts shall be passed. . . .

United States Constitution, Amendment XXI, Section 2:

> Transportation or importation into any State, Territory or possession of the United States for delivery or use

therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Beer Brewers and Wholesalers Act, Minnesota Statutes Chapter 325B (1977) (selected provisions):

Minnesota Statutes, section 325B.15:

The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977.

Minnesota Statutes, section 325B.08:

If a brewer engages in conduct prohibited under sections 325B.01 to 325B.17, a wholesaler may maintain a suit against the brewer. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under sections 325B.01 to 325B.17, including, but not limited to, declaratory judgment and injunctive relief. The court may, if it finds that the brewer has acted in bad faith in invoking the amendment, termination, cancellation or nonrenewal provisions of sections 325B.01 to 325B.17, or has unreasonably withheld its consent to any assignment, transfer or sale of the wholesaler's agreement, award punitive damages, as well as actual damages, costs and attorneys' fees.

Minnesota Statutes, section 325B.06:

No Brewer shall unreasonably withhold consent to any assignment, transfer or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers.

THE DECISION BELOW

The Minnesota Supreme Court was confronted in the decision below with Contract Clause challenges by a beer brewer ("Anheuser-Busch"), under the United States and Minnesota constitutions,[3] to a portion of the Minnesota Beer Brewers and Wholesalers Act (Minn. Stat. Ch. 325B, effective May 28, 1977) ("the Act"). Specifically, the challenged portion of the Act is limited to the express *retroactive* mandate of § 325B.15, which made the judicial remedies provided in § 325B.08 available to a Minnesota beer wholesaler ("Saratoga"), who claimed that Anheuser-Busch violated § 325B.06 by unreasonably withholding its consent to a transfer of Saratoga's business to a prospective successor wholesaler ("Ribbon"), where the preexisting Wholesaler Equity Agreement between Saratoga and Anheuser-Busch (Pet. App. at A-20 - A-39) gave Anheuser-Busch the unqualified contractual right to approve or disapprove Saratoga's proposed ownership transfer.

The Minnesota Supreme Court followed the Contract Clause test enunciated in *Energy Reserves,*[4] which it initially adopted and followed in its earlier decision in *Christensen v. Minneapolis Municipal Employees Retirement Board,* 331 N.W.2d 740 (Minn. 1983):

> 1. ". . . a court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation. The severity of the impairment increases the level of scrutiny to which the legislation is subjected." (392 N.W.2d at 872).

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[3] Art. I, § 10 and art. 1, § 11, respectively.

[4] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983).

2. "Secondly, if a substantial impairment exists, those urging constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation." (*Id.*).

3. "Having ruled that there was no 'significant and legitimate public purpose' to be remedied by the Minnesota Beer Brewers and Wholesalers Act, it is unnecessary to address the third part of the *Energy Reserves* test." (*Id.*, at 875).

Petitioners do not challenge the decision below on the ground that an improper Contract Clause analytical framework was applied by the Minnesota Supreme Court. Petitioners' contention essentially is that the decision below is destructive of the powers of the State of Minnesota under the Twenty-First Amendment (Pet. at 18),[5] despite the fact that "the issue . . . is not whether the legislature could regulate prospectively contracts of this nature, but rather whether the statute can be retroactively applied absent a 'significant and legitimate public purpose.' " (*Id.*, at 876).

In applying the appropriate Contract Clause analytical framework, the Minnesota Supreme Court based the decision below on the first and second parts of the *Energy Reserves* test, and found that:

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[5] According to Petitioners: "They [liquor manufacturers] can claim the Contract Clause overrules the state's power under the twenty-first amendment." (Pet. at 18). To be sure, this obvious overstatement cannot be reconciled with the Minnesota Supreme Court's observation: "Without doubt, states possess large powers to regulate not only the importation of liquor from other jurisdictions, but also its intrastate distribution." (citations omitted) (392 N.W. 2d at 873). As the decision below correctly noted, Anheuser-Busch "acknowledges that states have broad regulatory authority over the importation and distribution of liquor within their boundaries". (*Id.*).

1. The *retroactive* application of the challenged portion of the Act substantially impaired the parties' contractual rights and obligations because the State of Minnesota had never before sought to regulate such contractual rights and obligations in the manner sought to be accomplished by the Act. (*Id.*, at 874).

2. The Act "has all the earmarks of narrow special interest legislation devoid of any broad public purpose" lacking any "significant or legitimate public purpose." (*Id.* at 875).[6]

Because of the absence of any " 'significant and legitimate public purpose' ", the Minnesota Supreme Court concluded it was "unnecessary to address the third part of the *Energy Reserves* test." (*Id.*).

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[6] The Minnesota Supreme Court indeed went further: It determined that Petitioners made "absolutely no showing that the disruption of the contractual expectations of Anheuser-Busch and Saratoga was necessary to meet any important, broad, and general economic or social problem" (392 N.W.2d at 874); and, that the Act "on its face is anti-competitive, [and] contrary to the long standing public policy of this state" which favors the promotion of competition and the restriction of monopolistic power in the business of distributing liquor and beer in Minnesota. (*Id.* at 875).

ARGUMENT

I. THE DECISION BELOW IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has long recognized that where the judgment of a state court rests on both non-federal and federal grounds, "our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983). The Minnesota Supreme Court clearly reached the decision below on independent and adequate state grounds.

Contrary to petitioners' assertion, the decision below does contain a "plain statement" that it rests on state grounds:

> Accordingly, our answer to the certified question is that the Minnesota Beer Brewers and Wholesalers Act . . . applied retroactively to a preexisting agreement between a brewer and a wholesaler . . . does unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement, U.S. Const. art. I, § 10 *and Minn. Const. art. 1, § 11.* (emphasis added)[7]

(392 N.W.2d at 876).

The Minnesota Supreme Court relied upon Minnesota authorities which recognize the presumption of constitutionality

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[7] The Minnesota State Court's reliance on independent and adequate state grounds clearly distinguishes the present case from those cited by Petitioners. *Michigan v. Long, supra,* 463 U.S. at 1043 (1983) (apart from two citations to the state constitution, "the court below relied *exclusively* on its understanding of . . . federal cases.") (emphasis in original); *New York v. Class,* —— U.S. ——, 106 S.Ct. 960 (1986) (the state court mentioned the state constitution only once, and indiscriminately cited state and federal cases for the same general propositions).

and the absence of appellate deference to the trial court's conclusions of law. (*Id.*, at 872). It based its constitutional analysis on an earlier Minnesota decision which "noted and applied the three-part test enunciated in *Energy Reserves.*" (*Id.*) [8]

Further, the Minnesota Supreme Court relied on its construction of the Act and the contract between Anheuser-Busch and Saratoga, and considered the effect of the Twenty-First Amendment and federal, Minnesota and California decisions construing the effect of the Amendment (the Twenty-First Amendment and liquor industry regulations "may be relevant to the inquiry, [but] they are not dispositive." (*Id.*, at 873)). It also considered Minnesota's Intoxicating Liquor Act, Minnesota's Franchise Act, state and federal decisions considering the constitutionality of retroactive application of other statutes, and prior Minnesota decisions regarding pre-Act common law and statutory remedies. (*Id.*, at 872-874). In reaching its conclusion that "there exists absolutely no showing that the disruption of the [parties'] contractual expectations . . . was necessary to meet any important, broad, and general economic or social problem," the Minnesota Supreme Court relied on a "suggestion" in a federal decision as to the nature and scope of the required public purpose, and the public policies of the State of Minnesota as expressed in previous Minnesota legislation, legislative history, and prior Minnesota decisions. (*Id.*, at 872 n. 11, 874-875).

Considerations of respect for the independence of state courts, and the avoidance of rendering advisory opinions,

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[8] *Michigan v. Long, supra,* 463 U.S. at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purposes of guidance, and do not themselves compel the result that the court has reached.").

strongly suggest that the Petition should be denied because the decision below was based upon independent and adequate state grounds.

II. NO CONFLICT BETWEEN STATE COURTS EXISTS.

Petitioners incorrectly assert that the decision below is in conflict with *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1191 (1984), as a ground for review by this Court. (Pet. at 11-18).

The decision below correctly observed that the challenged portion of the Act *retroactively* created a statutory civil cause of action in favor of a Minnesota beer wholesaler against a beer brewer which exposed the brewer to liability for compensatory and punitive damages, as well as costs and attorney's fees, for exercising an express contractual right, *viz*, disapproval of a proposed transfer of ownership of the beer wholesaler, under circumstances where the exercise of that express contractual right otherwise "would have afforded no legal recourse" under the contract. (392 N.W.2d at 874). The statutory "unreasonably withhold[ing] consent" provision (Minn. Stat. § 325B.06) was retroactively superimposed on preexisting agreements as the statutory predicate for liability (Minn. Stat. § 325B.15) where a brewer's withholding of consent under its contract with a Minnesota beer wholesaler would give rise to no contractual liability.[9]

Commencing at least with *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940), this Court, in evaluating the degree of contract impairment, has looked to the extent to

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[9] "All parties concede that in the wholesale equity agreement with Saratoga, Anheuser-Busch reserved to itself the unrestricted right to approve or disapprove any proposed change in the ownership of Saratoga." (392 N.W.2d at 872).

which the industry a party has entered has been "already regulated *in the particular* to which he now objects . . ." (emphasis added). *See Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 242 f.n. 13 (1978); *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411 (1983).

In *Schieffelin & Co.*, statutory restrictions on the termination of liquor distributorships preexisted a later legislative reduction in the holding period for "just cause" terminations from twenty-four to six months. In that legislative context, the Connecticut Supreme Court concluded that the claimed contract impairment was neither "cataclysmic" nor "a substantial impairment of the plaintiff's distributorship relationships". (479 A.2d at 1201). The legislation subjected to an unsuccessful Contract Clause challenge in *Schieffelin & Co.* was simply a modification of already existing statutory regulation of the contractual rights between an out-of-state liquor shipper and one of its Connecticut liquor distributors.

The decision below arose from an altogether different legislative context, in which the State of Minnesota had never before sought to regulate, in any manner whatever, the contractual relationships between beer brewers and Minnesota beer wholesalers. (392 N.W.2d at 873, and nn. 12 and 13). While observing that Minnesota's liquor industry, in general, is subject to "pervasive prior regulation" (Pet. at 13), nowhere do Petitioners cite to any prior Minnesota legislation which sought to regulate the contractual relationships between beer brewers and Minnesota beer wholesalers, either in a general fashion or "in the particular" sought to be accom-

plished *retroactively* by the challenged portion of the Act.[10] This significant point distinguishes, and thus reconciles, the decision below and *Schieffelin & Co.*

Simply put, the presence of state regulation of a particular subject matter permits parties to contract with each other in light of the existing regulation. In that situation, as was present in *Schieffelin & Co.*, the magnitude of contract impairment produced by subsequent legislation that further regulated the same subject matter may prove to be acceptably slight. Conversely, the absence of prior state regulation of a particular subject matter, as considered in the decision below, increases the magnitude of contract impairment produced by retroactive legislation to such a degree that it becomes unconstitutional.

Lest there be any doubt on this point, at oral argument before the Minnesota Supreme Court Petitioners' counsel made the following concession in response to the Court's question:

> A JUSTICE: Counsel, what it comes down to is there a judicial determination of whether it's reasonable or not. Up to the point where this act was passed, had, through those long years of regulations, the state regulated the brewers' contractual right to disapprove a wholesaler's proposed change of ownership, had they regulated that?

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[10] The Minnesota Supreme Court rejected Petitioners' arguments, repeated in their Petition (Pet. at 14-16), that Minnesota's franchise laws and a provision in the agreement between Anheuser-Busch and Saratoga satisfied the requisite prior state regulation requirement so as to have reduced the challenged portion of the Act's contract impairment to an acceptable constitutional level. (392 N.W.2d at 873, nn. 12 and 13).

MR. MILHALEK: To the best of my knowledge, Your Honor, no, they had not regulated that particular, ...[11]

III. NO SIGNIFICANT TWENTY-FIRST AMENDMENT ISSUE IS PRESENTED.

Petitioners assert that the decision below is in error because it failed to accord appropriate constitutional significance to the State of Minnesota's Twenty-First Amendment powers in concluding, as it did, that the retroactive application of Minn. Stat. §§ 325B.06 and .08 unconstitutionally impaired the preexisting Wholesaler Equity Agreement between Anheuser-Busch and Saratoga. (Pet. at 7-10). Against the backdrop of numerous so-called "unfair trade practices" the Act defined (Pet. at 8-9), Petitioners assert that the Minnesota Legislature's justification for expressly making the Act *retroactive* was to assure uniformity "to all wholesalers operating in the state, rather than just the new wholesalers" (Pet. at 10) who presumably became such after the Act's effective date (May 28, 1977). Quite obviously, Petitioners have no support for this purported legislative justification, for they cite to none.[12] More importantly, equalizing the ability of Minnesota beer wholesalers to sue beer brewers for violations of the Act is not sufficient justification, in a constitutional sense, for substantially impairing preexisting contract rights between beer brewers and Minnesota beer wholesalers.

Core Twenty-First Amendment interests involve "whether to permit importation or sale of liquor and how to structure

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[11] Trans. Oral Arg. Minn. S. Ct. (May 5, 1986), at 30-31 (Resp. Supp. App., at Supp. A-24); *see also id.*, at 34 (Resp. Supp. App., at Supp. A-26).

[12] *See*, Rule 1.18 of the Rules of the Minnesota House of Representatives and Rule 65 of the Permanent Rules of the Senate, both of which render preserved discussion and testimony before those legislative bodies inadmissible on issues of legislative intent.

the liquor distribution system." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The decision below does not involve issues of whether to permit the importation of liquor, whether to permit the sale of liquor, or the "structure" of the liquor distribution system in Minnesota. Instead, its focus was on the private contractual relationships between beer brewers and Minnesota beer wholesalers in existence when the Act became law.

Anheuser-Busch has never challenged the prospective application of any of the Act's provisions. Only the challenged portion of the Act, Minn. Stat. § 325B.15's express retroactive mandate of the limitations and penalties found in §§ 325B.06 and .08, works a substantial impairment of Anheuser-Busch's preexisting contract right to approve or disapprove Saratoga's proposed ownership transfer to Ribbon. The Minnesota Supreme Court found that the Act "on its face is anticompetitive, contrary to the long-standing policy of the state" (392 N.W.2d at 875), and "appears to be primarily special interest legislation in favor of the wholesaler distributors." (*Id.*).[13] However viewed from a Twenty-First Amendment perspective, Petitioners' attempt to create a justification for the challenged portion of the Act must fail in the ultimate, but in any event, it fails to present an issue of constitutional magnitude under the Twenty-First Amendment worthy of this Court's review.[14]

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[13] *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 111 (1980) ("Nevertheless, this Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters of state law [citation omitted], and we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances.' ").

[14] *Cf., Newport v. Iacobucci, reversed and remanded*, 55 U.S.L.W. 3352 (U.S. Nov. 18, 1986) (No. 86-139) (*per curiam*); *324 Liquor Corp. v. Duffy, prob. jurisdiction noted*, 54 U.S.L.W. 3630 (U.S. Mar. 24, 1986) (No. 84-2022); *South Dakota v. Dole, cert. granted*, 55 U.S.L.W. 3391 (U.S. Dec. 1, 1986) (No. 86-260).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

December 19, 1986.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

State of Minnesota
County of St. Louis

District Court
Sixth Judicial District

File No. 145208

EARL D. JACOBSEN, and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributors, Inc.,
Plaintiffs,

vs.

ANHEUSER-BUSCH, INCORPORATED,
Defendant.

ORDER

The Court has previously considered the motion of defendant Anheuser-Busch, Incorporated to dismiss Counts I and II of plaintiffs' Complaint, and denied that motion by Order and Memorandum dated August 19, 1985 (copy attached).

Counts III and IV of plaintiffs' Complaint were earlier dismissed by the Court or voluntarily abandoned by the plaintiffs prior to trial, thereby leaving only the claims pleaded in Counts I and II for trial. Plaintiffs' Count I claims are predicated solely upon defendant's alleged violations of the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§325B.-01, *et. seq.*, effective May 28, 1977. Defendant asserts the constitutional challenge in defense to plaintiffs' Count I claims that the statutes in question, if applied retroactively as expressly mandated by Minn. Stat. §325B.15, would violate Art. I, §10 of the Constitution of the United States and Art.

I, §11 of the Constitution of the State of Minnesota (impairment of contract). Plaintiffs' Count II claim is for punitive damages based on Minn. Stat. §325B.08, or in the alternative, Minn. Stat. §549.20.

The Court has concluded, and the parties concur, that to proceed to a full trial on the merits of plaintiffs' Count I and Count II claims would be wasteful of the Court's time and the parties would be put to undue expense if defendant's constitutional challenge and defense to plaintiffs' Count I claims are meritorious. Therefore, pursuant to Rule 103.03(h), Rules of Appellate Procedure, the Court hereby certifies that the following question, presented by defendant's said motion to dismiss is important and doubtful:

> Does the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§325B.01 *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. §325B.15, unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement under Art. I, §10 of the Constitution of the United States and Art. I, §11 of the Constitution of the State of Minnesota (impairment of contract).

Dated: September 17, 1985.

By the Court:
HON. CHARLES T. BARNES
Judge

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STATE OF MINNESOTA
SUPREME COURT

Case No. C7-85-2105

EARL D. JACOBSEN, and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributors, Inc.,

Plaintiffs,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Defendant.

The following transcript contains the arguments of Lawrence C. Brown, Esq., and Joseph J. Mihalek, Esq., before the Minnesota Supreme Court on May 5, 1986.

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MR. BROWN: Mr. Chief Justice, Justices of this Honorable Court and counsel:

The issue presented on this appeal comes from a certified question from Judge Barnes in Duluth and involves the claim by Anheuser Busch that the Minnesota Brewers and Whole-

salers Act which was adopted effective May 28, 1977, constitutes an unconstitutional impairment of the private contract rights between Anheuser Busch, a beer brewer, and Saratoga Distributing Company and its owners the Jacobsen brothers; that contract having been entered into in September of 1976, some nine months prior to the effective date of dispatching [(sic) this statute].

The statute in Section 15 makes clear that it is expressly mandated retroactively because it applies to all contracts between beer brewers and Minnesota wholesalers that were in effect on and after the effective date of the statute, May 28, 1977.

JUSTICE KELLEY: Before you get into further argument, I would like to ask during the course of your argument you explain to this Court what the meaning of that clause in the contract was to the effect that your contract rights and obligations would be subject to the laws of Minnesota as enacted or would be enacted during the term of the contract.

MR. BROWN: Justice Kelley, I am prepared to do that and I will.

By way of very brief background, the Jacobsen brothers decided in 1976 they wanted to get into a business and they negotiated the purchase of the Anheuser Busch Duluth beer wholesalership. That was done with the approval of Anheuser Busch, and they entered into a wholesaler equity agreement which is part of the record in this case.

They operated the distributorship in Duluth for approximately one year and decided they wanted to sell it. They entered into negotiations with another individual who is a named plaintiff, Mr. Kenneth Stretar. He is now dead. He was then the owner and operator of the Duluth Pabst distributorship.

They negotiated a contract for a sale of the business which, under the Wholesaler Equity Agreement, required the express

approval of Anheuser Busch. Approval was sought and rejected on the grounds stated in a letter which is part of the record, I think it's dated January 18, 1977, from Anheuser Busch to the Jacobsens.

About six months later the Jacobsens sold their business, and then in 1979 commenced this action.

As originally commenced there were four counts. By the time we got to trial a year ago in April, all counts had been either dismissed by prior court order or withdrawn on the eve of trial so that there only remained for trial the Count I claim which is premised on the Beer Brewers and Wholesalers Act and the pendent punitive damage claim that is asserted along with it.

Now, the contract, Justice Kelley—since you have asked—let me get right to that. In the Energy Reserves case which is a 1983 U.S. Supreme Court case that dealt with a Kansas statute regulating the price of natural gas, which was enacted after federal legislation, invited the gas and oil producing states to enact legislation dealing with different prices between what was called old gas and new gas.

The Footnote 13 specifically cites and discusses the level of regulation by the State of Kansas over the gas and oil industry as it is conducted in the State of Kansas.

The contract at issue was a contract between a supplier and a public utility, and the opinion of the United States Supreme Court is quite clear that under Kansas law, the level and magnitude of state regulation of the entire natural gas industry is very intense, in fact, I think they use the words, "broad and sweeping," in terms of the regulation.

Your Honor will note that in both the Energy Reserve case and the Allied Structural Steel case, which involved the Minnesota Private Pension Act, in both cases the Veix case is cited—that is a 1940 United States Supreme Court decision—

for the proposition that, in Veix, the critical fact was that the purchaser who was complaining about unconstitutional contract impairment had bought into an enterprise that was already regulated in the particular that he was complaining about.

Now, it is true that the contract here, the Anheuser Busch sale or equity agreement contains a prospective anticipatory clause adopting future state legislation. The reasons why that is not a bar to the constitutional challenge of Anheuser Busch, the reasons, are these:

First, we can find no law even in the Energy Reserves case that says contracting parties in a private contract by such a clause contemplates future unconstitutional state legislation. As a matter of private contract that goes beyond the mutual expectations, we believe, of any contracting parties.

But in addition to that, we have cited to the Court the Nebraska decision, and also the Garris decision out of the Fourth Circuit in which a similar attempt was made to point to state regulations that imposed upon the license there at issue that had been cancelled, certain prospective, anticipatory law changes; and the Court held that when you are dealing with a matter of constitutional magnitude, as we are here, those do not incorporate future unconstitutional changes in the law.

The certified issue under Chapter 325(b) [(sic) 325B] focuses on what, to our view, is the equivalent of legislative bushwacking. Whenever a statute is made to apply retroactively to a matter of private contract, by definition, the agreement of the parties is changed.

Now, the first issue, and the issue on which we failed to prevail before the trial court was in persuading Judge Barnes that the impact of the Beer Brewers and Wholesalers Act on

the contract at issue substantially impaired the rights of Anheuser Busch and that is properly the threshold issue to be viewed.

In the Allied Structural Steel case, the Minnesota Pension Act imposed a $185,000 assessment on the complaining party, Allied Structural Steel, and in that case the Supreme Court said there can be no question of the impact.

In this case, by virtue of the adoption of the Act at issue and its retroactive application, we are here in this Court in a litigated matter where, under the terms of the contract, there would have been no legitimate claim.

It is admitted between the parties, and it has never been at issue, that under Paragraph 4 of the Beer Brewers and Wholesalers Act [(sic) Wholesaler Equity Agreement], as a matter of private contract, Anheuser Busch could exercise its own business judgment when Saratoga and the Jacobsen brothers requested a transfer of the ownership of their wholesalership to Mr. Stretar.

There was a contract claim pleaded, but it was voluntarily withdrawn on the eve of trial, and plaintiffs counsel took the position this is not a contract case. We took the position it never was. It wasn't until the case came up for trial that they agreed with us.

Our principal complaint, and it's predicated primarily on the United States Supreme Court decision in Allied Structural Steel, the Nebraska Supreme Court case we cited you to, and the Garris case out of the Fourth Circuit, is that here we have a statute that was enacted to be effective and applied to preexisting contracts between beer brewers and beer wholesalers in the State of Minnesota. The very act that Anheuser executed, namely, its decision to disapprove Mr. Stretar, could not as a matter of law under the contract have brought Anheuser Busch in as a defendant to the claims being asserted.

The very same Act, by virtue of a statutory overlay on the contract, now means that Anheuser Busch, if the statute is constitutional, must defend itself against the statutory claim which, under the contract, would have given rise to no liability.

In our briefs we cited Your Honors to cases which we believe are directly on point, the most important being the Garris case, the insurance agency case. In that case the insurance company had a contract with its agent but was terminable on 60 days notice without cause. The statute was enacted that created various reasons that had to exist before you could terminate, and in that case the Court held the application of that kind of a statute retroactively would clearly violate the contract clause. We believe we have the identical situation here.

Now, much is made in the plaintiffs brief about the reserve powers of the state under the Twenty-First Amendment. We do not challenge the power of the State of Minnesota under the Twenty-First Amendment to regulate the flow of alcoholic beverages and their sale.

In this particular statute, in Chapter 325(b) [(sic) 325B] there is only one section—.09—that speaks to that exercise of constitutional powers, and that statute says that it prohibits price fixing.

That section is irrelevant to the issues before you in this appeal, that that is clearly the kind of reserve power that we acknowledge the State of Minnesota has over alcohol and beer products sold in the State of Minnesota to prohibit price fixing. I don't think anybody would challenge that.

Going back to the Veix case in 1940 which has been relied upon in the two most recent Supreme Court decisions, Allied Structural Steel and Energy Reserves, the distinction that I see being made by the Court is that in order to get by a substantial impairment, you can make a showing that the con-

tractual relationship being complained about is one in an area where the particular at issue was subject to prior state regulation so that in fairness where the private parties contracted with each other, they were forewarned to anticipate the impact of the statute on their private contractual relationships.

The record in this case, and the briefs submitted in opposition to Anheuser Busch, refer to absolutely no evidence of legislative history of the purposes of the statute, and most importantly, there is no evidence that the State of Minnesota, prior to May 28, 1977, ever sought to regulate private contractual relationships between Minnesota beer wholesalers and brewers.

As a consequence, when the Anheuser Busch Wholesaler Equity Agreement was entered into in September of 1976, neither of the parties were forewarned that the state would at a future date attempt to regulate contractual relationships retroactively.

And, Justice Kelley, coming back to your question, I wish to emphasize that we are not challenging the prospective application of this statute. Those are constitutional issues which are, I am told, being litigated in other cases, and may visit this Court in other appeals.

Our challenge is the contracts clause complaint as to the retroactive application of these statutes to the preexisting contract.

JUSTICE COYNE: Mr. Brown, as I understand both the briefs and my review of the contract, there is no termination date built into the contract?

MR. BROWN: You are correct.

JUSTICE COYNE: In that event, how does the state ever regulate the contract between your client and the Minnesota wholesaler? Do you forever escape regulations?

MR. BROWN: No. No. People don't live that long. These are personal service contracts as the contract specifically states. They change hands. People go in and out of business.

As to any Wholesaler Equity Agreement entered into after the effective date of the statute, the statutory regulations are mandated in light of the effective date of the statute and would apply to future contracts.

This particular contract got changed in the summer of 1978 when the Jacobsens sold to a purchaser who was approved by Anheuser Busch.

JUSTICE COYNE: Wouldn't you be making exactly the same argument if both Mr. Jacobsens had died and their estate had sold this thing to Mr. Stretar?

MR. BROWN: Quite to the contrary. Your question is in two parts, Justice Coyne. Let me take the first part.

There is a provision in the Wholesaler Equity Agreement that permits, without any prior approval of Anheuser Busch, the transfer of the wholesalership business to the heirs or legatees of the wholesaler owners. So that transaction doesn't require any approval of Anheuser Busch. Once that transaction occurs there would be a new contract, and that new contract would have come into existence after the effective date of the statute.

That is the way, in the fact situation that you present to me, that a new contract would be written, and it would be written under the effective statute.

A JUSTICE: I have a little different question that is bothering me a bit. I suppose parties can agree in a contract that they will not be bound by whatever law is passed by the state hereafter. You know, I would certainly agree that in that kind of an agreement, the contracting parties do not contemplate a law that is unconstitutional in its effect.

But here if it's claimed that the law is unconstitutional because it's an impairment of the contract, I don't know if the contract itself made by the parties has eliminated that particular constitutional argument?

MR. BROWN: I think where your question comes from is in the substantial impairment area, and I think you may be suggesting a possibility of a perfect circle here between, I think it's Paragraph 16 of the Anheuser Busch contract, and the constitutional impairment theory. For whatever light I might shed on it, Your Honor, I would say this:

With respect to substantial impairment, as I read the United States Supreme Court cases, one of the focal points is what did the parties contemplate as you would in any contract analysis exercise.

When the parties put in a provision in their contract, as was in the Energy Reserve case, dealing, as I said, with the highly regulated area in a particular area here that they were faced with.

In that case, it is false, if you will, for a party to complain: Hey, my contract is substantially impaired in an unconstitutional sense because I had no forewarning, I had no way of contemplating when I included in my agreement incorporating future state law changes, they were ever going to do this to me.

In our case, Your Honor, and I am repeating myself because I think it bears repeating, there is no evidence—none—of any prior regulation by the State of Minnesota before the effective date of this statute over the private contract relationships between beer brewers and Minnesota wholesalers.

And as we read the Veix case in 1940, as twice relied upon in the two most recent United States Supreme Court cases, unless there is a showing that the state has prior regulation of the particular complained about—and that's not my word,

that's the United States Supreme Court's word—then you can have a substantial constitutional impairment.

Now, here, what is Anheuser Busch exposed to? It's exposed to a statutory claim that didn't exist when its contract was entered into. It is exposed to the fact that what it did, consistent with the contract, is now made apparently illegal by statute.

The claims pleaded include a claim in excess of $50,000 of compensatory damages. There is also a claim under the statute for punitive damages, and there is a claim under the statute for attorney's fees and costs.

Now, when this case was on the eve of trial, and this became—Count I became the only substantive claim left, we immediately moved, first orally and then in writing, for dismissal, asserting our contract clause defense.

The magnitude of the impairment in this case, had the case gone to the jury, if you would have believed the plaintiffs evidence, would have far exceeded the $185,000 which in Allied Structural Steel the United States Supreme Court dismissed in a sentence as saying there isn't even an issue as to impact.

What we have here in our view, if you go beyond the substantial impairment issue, which the District Court felt no need to, is the other two prongs, if you will, of the three-part test, namely, a significant and legitimate public purpose and reasonably appropriate method by which that purpose is implemented, we think it's totally downhill in favor of Anheuser Busch.

This statute contains 17 sections. If you throw out the first and the last, which are definitional and future law, of the 15 that remain, 9 are phrased: Thou shalt not, and are all directed against beer brewers, Entry 8 [(sic) with], no obligations for wholesalers.

The only one that is mutual is that in Subsection 16—it may be 10, my notes are blurred—there is one mutual obligation that each side to the contract shall not interfere with the others freedom of association.

To suggest that this legislation was enacted for any public purpose, in our view, is a mockery of the concept of what constitutes a public purpose.

Unless there be any doubt about that, in the Friend of the Court brief filed by the Minnesota Beer Wholesalers Association at Page 6, they candidly acknowledged that the legislation was, "Enacted to protect a certain class, beer wholesaler."

That is why this legislation was enacted in May of 1977. It's clear on the face of it that is why it's enacted as it was.

There is no promotion of temperance or any other public purpose properly reserved under the police power for state regulation.

In terms of this being reasonable and appropriate, really, all it did at the time was to give Minnesota a beer wholesalers special interest, economic protection legislation, a basis upon which to sue beer wholesalers where they couldn't sue them under existing contracts for breach of contract.

If Your Honors have any questions I would be glad to answer them, otherwise I would like to reserve my time.

A JUSTICE: Let me ask you one question to follow up Justice Coyne's question. Since the contract has no termination date, could go on, as she suggested, forever, you say that is not so because it's a personal contract.

It seems to me in reading this over it's an assignment of the contract. You don't give out a new contract, you just continue the old one and people are substituted.

MR. BROWN: Your Honor, under the terms of the contract, there are provisions for a deficiency termination in Paragraph

5—that is Page 35 of the record—there is immediate termination in Paragraph 6.

(Inaudible question by a Justice.)

MR. BROWN: Then there is a brand new contract entered into, and if it was entered into after May 28, 1977, we wouldn't be here fighting that contract.

(Inaudible question by a Justice.)

MR. BROWN: You will also notice, Your Honor, there is a provision in here for the wholesaler to terminate the contract.

MR. MIHALEK: May it please the Court and Mr. Brown:

My name is Joseph Mihalek. I represent the plaintiff respondents Earl and Ernie Jacobsen.

As the Court knows, this matter is before the Court because the Jacobsens requested that Anheuser Busch consent to the transfer of this Wholesalers Equity Agreement to Ribbon Distributing Company. That consent was denied.

The Jacobsens filed the suit claiming that under the Beer Wholesalers Act—Beer Brewers and Wholesalers Act—Anheuser Busch was not allowed to arbitrarily and capriciously deny the sale and assignment of that contract unless it could show that the prospective buyer did not meet reasonable and material standards established by Anheuser Busch for such transfers.

As with any statute, this statute comes before the Court with the presumption that it is constitutional, and the burden of proof is on the appellant to establish beyond reasonable doubt that it is unconstitutional. We believe that the appellant has failed to meet that burden.

First of all, not all impairments of contract are unconstitutional. The United States Supreme Court, and this Court, have recognized that there are certain impairments, certain statutes which can be adopted which affect and adjust contract

rights, but that does not automatically make the statute an unconstitutional impairment of contract.

The United States Supreme Court in the Energy Reserves case established the government test in 1983 that the Court is to follow in determining whether a statute unconstitutionally impairs a contract, and that's a three-part test.

The first part is to determine whether there is a severe or substantial impairment of the contract rights. We believe that if, that in this case, there is no substantial impairment of contract rights, and therefore the Court need not even address the second and third tests of the Energy Reserves test.

A JUSTICE: The new act creates remedies that did not exist and subjects the brewer to substantially severe financial penalties that would [(sic) would not] have existed had the 50 [(sic)] act never existed. Why isn't that substantial?

MR. MIHALEK: Your Honor, because the severe impairment test, first test of the Energy Reserves case, is premised on some underlying factors. In Energy Reserve the Court determined because the parties were engaged in a heavily regulated industry, they should have expected that the state would continue to regulate in that area.

A JUSTICE: But in this case, according to Mr. Brown, the state has never regulated the relationship between brewers and wholesalers, is that correct?

MR. MIHALEK: We disagree, Your Honor. This contract, which they call a personal service contract, is in essence nothing more than a contract enabling Anheuser Busch, a Missouri company, to import and distribute alcoholic beverages in the State of Minnesota. As such, that contract is subject to the police powers under the Twenty-First Amendment.

The state has established through regulation a system for the distribution and sale of alcoholic beverages in Minnesota.

It's a three-tier system: The brewers on the top, the wholesalers in the middle, and the retailers on the bottom.

The state has by many regulations determined that that system shall exist and has regulated the rights and responsibilities among those three tiers.

A JUSTICE: And you are saying to the Court now the statute permits that system?

MR. MIHALEK: The statute promotes the three-tier system of distribution by preventing brewers from engaging in monopolistic and coercive control over wholesalers.

Brewers are already prohibited from engaging in the retail business. If they are able to coerce and intimidate wholesalers into violating the law or engaging in some type of monopolistic practice, they will in essence gain indirect control over retailers.

They could, if a wholesaler refused to do what the brewer wanted, the wholesaler could be terminated without just cause, and the wholesaler is simply trying to follow the state law.

A JUSTICE: Let's say it would be correct with respect to future agreements entered into after the statute was enacted, how is that involved in this case. The contention of the appellant here is that as applied in this case, the statute was unconstitutional?

MR. MIHALEK: Our responses to that is several, Your Honor.

First of all, the statute was in place before the Jacobsens requested the right to assign this contract, therefore, Anheuser Busch is not in the same situation as existed in the Allied Structural Steel case where they were required to pay out money after the fact, having assumed that they had properly funded their pension.

Here the statute was enacted, the Jacobsens requested the right to transfer the contract, Anheuser Busch had full notice that under the statute they could order their affairs and conduct the review of that request for assignment in light of the statute, establish their own reasonable and material standards and then apply those standards to the request for assignment.

In essence, the statute as applied retroactively does not punish Anheuser Busch for something that it did prior to the time the statute was enacted.

Another reason, Your Honor, is that under the severe impairment test of the Energy Reserves case, the factor which the Court there touched upon very clearly, was that in that case parties had entered into a contract which said that it was subject to the laws, the rules, the regulations in the State of Kansas.

We have exactly the same situation in this case as existed in the Energy Reserves case. Not only do we have an industry which is heavily regulated, but we have a contract which goes even farther than the contract in the Energy Reserves case.

This contract contains a statement that says it's subject to the laws, rules and regulations of the State of Minnesota, and certainly the appellant has argued that simply means they are to follow the laws in the State of Minnesota. We don't deny that.

But it goes farther than that, it's a separate section of Paragraph 16 which says not only is this contract subject to the laws of the State of Minnesota, but we are incorporating into this contract all present and future laws passed by the State of Minnesota which bear upon the contractual relationship between the parties, and it uses the term contractual relationship between the parties.

We contend that's a clear indication that the parties contemplated that the state have the right to regulate that con-

tractual relationship as part of its overall system, overall plan for regulating the scheme of importation and distribution of alcoholic beverages in the State of Minnesota.

Does that answer the question adequately?

A JUSTICE: All right.

MR. MIHALEK: In the briefs, in the reply brief, the appellant makes the statement that the Twenty-First Amendment has little, if any, relevance to this case.

Obviously the Twenty-First Amendment has a great deal of relevance to this case for several reasons.

The State of Minnesota under the Twenty-First Amendment is granted the exclusive right to control the importation and distribution of alcoholic beverages in this state. This statute which defines the rights and obligations between brewers and wholesalers, is simply a small part of that overall statutory scheme for the importation and distribution of alcoholic beverages in the State of Minnesota.

I would like to go back and touch on one other point which relates to Paragraph 16 of the contract. It's a rule of construction that contracts are to be construed against the draftsman if there is any ambiguity in the contract.

There is no question in this case that the contract was drafted by Anheuser Busch, in fact, it's what we call a contract of adhesion. There is no negotiation, you take it or you leave it.

Part of that contract is Paragraph 16 which states that the laws, the rules, the regulations adopted by the State of Minnesota effecting the liquor industry are incorporated within that contract.

That point readily distinguishes this case from the cases relied upon by the appellants, the Garris case, the Wippenfurth case, Allied Structural Steel; because in none of those cases was there such a contractual provision incorporating

laws of the state which bear upon the contractual relationship between the two parties.

As Mr. Justice Simonett correctly pointed out, their argument here is that that provision does not apply in this case because they could not have contemplated that the state would enact an unconstitutional law.

That reasoning is circular and it goes nowhere. They are arguing that that incorporation provision does not incorporate an unconstitutional law, and that this law is unconstitutional because it changes the contract and arguing that it changes the contract because it's not automatically incorporated into the contract.

It's our position that it is incorporated into the contract automatically, and therefore, that there is no impairment of the contract rights. The parties' expectations at the time of contracting were not substantially impaired.

Now, if the Court were to determine that the rights of the party were substantially impaired, we think not, this statute still satisfies the second and third tests of the Energy Reserve case.

That second step in the test is to determine whether the statute furthers a significant and legitimate public purpose.

Here a brief review of the statute will show that the state has enacted a system for insuring fairness and good faith in the dealings between wholesalers and brewers. The statute does not only prohibit the things that Mr. Brown referred to, but prohibits brewers from coercing wholesalers to accept delivery of products not ordered.

It prohibits brewers from coercing wholesalers to perform illegal acts.

It prohibits brewers from fixing prices charged by wholesalers.

It prohibits them from taking retaliatory action against wholesalers who might complain to the applicable state agency that the brewer's violating state law.

It prohibits them from discriminating against wholesalers in pricing.

A JUSTICE: It also prohibits them from entering into an agreement with more than one distributor?

MR. MIHALEK: Yes, Your Honor.

A JUSTICE: It sounds as if it could ultimately be attacked on trust grounds doesn't it?

MR. MIHALEK: Your Honor, it's my understanding that the present system that is employed by Anheuser Busch is exactly that, that they do have exclusive dealerships. We don't believe that's the basis upon which to invalidate this statute in this case simply because the contract between the parties contemplates that the state might enact legislation requiring exclusive dealerships and provides that if the state requires it, this contract is to be so interpreted.

A JUSTICE: Counsel, am I mistaken, what relevance is all that to the issue before the Court today?

The issue before the Court is whether this statute as applied to this contract constitutes a constitutional interference with the right to make a contract, has nothing to do with any of those things you are talking about?

MR. MIHALEK: Well, Your Honor, to answer that question, we refer to the first step in the Energy Reserves test, that the United States Supreme Court has held that if there is no severe impairment of contract rights, the statute is not unconstitutional. In that case the Supreme Court determined that there was no severe impairment of contract rights for essentially two reasons:

The parties, first of all, were engaged in business in a heavily regulated industry. We have the same thing here, the liquor industry is heavily regulated by the State of Minnesota under the Twenty-First Amendment powers.

And the second reason set forth by the United States Supreme Court in Energy Reserves was that the parties had entered into a contract stating that the contract was subject to the laws of the State of Kansas, therefore, the Court concluded that they had contemplated continued state regulation in that area, that they would have to order their affairs in accordance with the state laws.

A JUSTICE: And significant punitive damages, attorney's fees and everything else?

MR. MIHALEK: Well, Your Honor, the legislature—first of all, the legislature has the right to enact legislation which creates causes of action, establishes damages to be awarded in the event someone prevails on a claim for a breach of the statute. It can also take away those rights.

We don't believe it's punitive in this case because the acts of which the plaintiffs complained all took place after the statute was enacted and allowed Anheuser Busch ample opportunity to review this request for assignment in accordance with the law, therefore it's distinguishable from the Allied Structural Steel case.

A JUSTICE: Counsel, you know that it looks to me what this boils down to is this:

Anheuser Busch wants to select who's going to distribute its beer, and that doesn't sound to me like an unreasonable request if you are trying to sell any product, whether it be groceries or beer, you want someone that is going to look out after your business interest whether it's Minnesota, Missouri, Wisconsin, New York or anywhere else.

Now, obviously they have got a provision in there that they want to look at when someone sells a distributorship, who the successor is going to be? They are going to have someone or they are not going to sell their beer in the area.

So I think it's just ludicrous to argue they would unreasonably want to simply agree to a sale to any wholesaler the present wholesaler may want to transfer the business to because if they did that, and they couldn't get a wholesaler, they wouldn't be selling their beer.

Then they get the State of Minnesota coming in and saying now we are going to put this provision in after this contract is entered into, and it seems that the result of the act is that the state can require the brewer to transfer his business, in effect, to a wholesaler who can sell not only his product but maybe sells other products.

Now, how is a brewer going to protect himself against a wholesaler who represents two or three brewers and may decide to push one at the expense of his product?

In other words, putting it another way, what is so unreasonable about this original contract provision?

MR. MIHALEK: Your Honor, first of all, the statute merely requires Anheuser Busch to be reasonable. It allows Anheuser Busch and all other brewers to establish what it believes are the material and reasonable standards to be applied in determining whether to approve that sale of the business.

It's not the state, unlike Globe Liquor, unlike the Nebraska case, it's not the state which sets those standards. It's Anheuser Busch, and as long as the standards are material and reasonable, and the appellant has, in essence, admitted that they currently apply material and reasonable standards, otherwise they wouldn't be able to sell their beer. How can it substantially impair the contract?

A JUSTICE: Counsel, what it comes down to is there a judicial determination of whether it's reasonable or not. Up to the point where this act was passed, had, through these long years of regulations, had the state regulated the brewers contractual right to disapprove a wholesaler's proposed change of ownership, had they regulated that?

MR. MIHALEK: To the best of my knowledge, Your Honor, no, they had not regulated that particular, but we believe under the applicable test in Energy Reserves, you do not have to show that the particular was regulated, only that the industry was regulated.

And furthermore, since this contract is in essence simply a part of an ancillary procedural scheme to import and distribute alcoholic beverages in the State of Minnesota, yes, that aspect has been regulated by the State of Minnesota for years.

A JUSTICE: I would like to have you answer two questions here.

First. Was that clause in the original contract all that unreasonable?

And the corollary is with the statute as now written, obviously it's the intent to enforce them to approve the sale, or the transfer of the distributorship. By doing that they will be dealing with a wholesaler who handles other products as well, isn't that right?

MR. MIHALEK: If the standards established by Anheuser Busch, their material and reasonable standards are such that Ribbon Distributing Company would have met those standards, then they would be dealing with Ribbon Distributing Company. But if Ribbon Distributing Company meets Anheuser Busch's own material and reasonable standards, why should they not do business with Ribbon Distributing Com-

pany? Why should they have the right to arbitrarily veto a transfer without having to give—

A JUSTICE: Why would they want to veto a transfer if it was to their best interest to approve them? Why would they want to veto?

MR. MIHALEK: Your Honor, that is exactly our point since the statute gives them the right to set the standards.

A JUSTICE: I don't think the original contract in a sense allows them to set any standards. There is certainly always a reasonable requirement in there for approving. They can't just, without giving any reasons, I don't see anything that this contract says without any reason at all they can refuse to accept an assignment.

MR. MIHALEK: Well, Your Honor, we believe that, first of all, there is a reasonableness standard implied in all contracts in this state. Certainly the Uniform Commercial Code has a good faith reasonableness requirement. The Franchise Act has such a requirement.

In this case, all the statute seeks to do is to require Anheuser Busch to act reasonably, and as Your Honor suggests, that they would want to do that anyway in order to make sure that the business was being transferred to a good purchaser who is going to do a good job for them, how is the contract severely impaired?

A JUSTICE: Isn't it impaired because before they could do it, now they have to go to Court? You are second guessed by statute?

MR. MIHALEK: They had an opportunity to order their affairs in accordance with the statute. The transaction occurred, the request for assignment occurred after the statute had been enacted.

In summary, Your Honors, we believe that under the first step of the Energy Reserves case, there is no severe impairment of contract.

Under the second and third steps, we believe there is a legitimate and significant public purpose behind the statute, and that the means used by the legislature to accomplish this objective, namely, to require the brewers to act reasonably and in good faith is a reasonable means to accomplish this objective.

Thank you.

MR. BROWN: I will be brief.

Mr. Justice Yetka, Anheuser Busch's reasons are set forth at Page 11 of the appellant's supplemental record. If Your Honor would care to read that letter, that will tell you why Anheuser Busch disapproved the transfer.

Mr. Justice Kelley, if I misspoke, I intended to refer Your Honor and your question to the Energy Reserves case, 459 U.S. at Page 416 and Footnote 22. There the Supreme Court focused on the contract there at issue and said, "Price regulation existed and it was foreseeable as a type of law that would alter contract obligations."

I will not only represent to Your Honors that there is no evidence of prior regulation in the record in this case with respect to the private contractual relationships between beer brewers and Minnesota beer wholesalers, I will represent to Your Honors that I personally know of none outside of the record, and I don't think there have been any.

The argument Mr. Mihalek presents is that Anheuser Busch somehow had an opportunity to react to this statute after its effective date. Obviously it couldn't because when it was made retroactive, it became the statutory overlay on what preexisted and those were Anheuser Busch's contract rights in the only part of the contract that gave it the right to exercise its own business judgment and disapprove.

We would respectfully request that this Court reverse the decision and dismiss this case.

A JUSTICE: Mr. Brown, under your argument you tell us, because we have read for ourselves, that the reasons Anheuser Busch denied the transfer are stated in the record. If I read the contract correctly, there is no necessity on the part of Anheuser Busch to do that, that is purely gratuitous, am I incorrect?

MR. BROWN: Your question, if I may, Your Honor, break it into two parts.

The mechanics of the contract are such that if Anheuser Busch took no action at all, the transfer would go through as approved.

The mechanical vehicle by which it disapproves is the letter of January 18, 1978. I suppose technically under the contract, Anheuser Busch may not have been contractually obligated to say more than, "We disapprove." It went beyond that as the record indicates.

A JUSTICE: Mr. Brown, would you agree or disagree with the statement made that in your contract there would be an implied obligation that Anheuser Busch act reasonably in approving or disapproving?

MR. BROWN: Your Honor, there is a Restatement Contract Second provision that says, and I can't quote you the number, that there is an implied obligation of good faith and oral contracts. I personally reject that. This is my own personal advocacy. That is the law in Montana and it is partly the law in California and other states.

In this state there is no private tort, as Your Honor knows, for bad faith breach of contract starting, I think, with Wild vs. Rarig and coming forward to the 451 Space Center case. At least there is no carte blanche good faith tort theory yet

under the law of Minnesota, and since you are asking me, and I am personalizing, I would strongly advocate against this revolution of the law because what it does, it takes a normal breach of contract case and turns it into a tort case. It brings in punitive damages, and it really causes a lot of problems.

A JUSTICE: Are you arguing, at least in part, one position would be that if there is some implied contractual duty to act reasonably, nevertheless the state law is a substantial impairment because of the added penalties, including the punitive damages it imposes?

MR. BROWN: There would be the added penalties.

Also, Your Honor, the state statute assumes that on its effective date, May 28, 1977, Anheuser Busch then had in place the so-called reasonable standards for the selection of successor wholesalers. There isn't any evidence that Anheuser Busch had such reasonable standards.

What might make a good wholesaler in Duluth, given the products market and ethnic background, might make a lousy wholesaler in Rochester.

So in terms of the good faith aspect of it, while I think that there can be argued that there was a good faith obligation to the extent that was part of the plaintiffs contract case, it was voluntarily dismissed on the eve of trial and never became a part of this case or a part of this record before this Court.

Thank you, Your Honors.

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REPORTER'S CERTIFICATE

I, Earl G. Anderson, do hereby certify that this is a transcript to the best of my ability of the transcription of the electrical sound recording of the arguments in the above-entitled matter which were recorded on May 5, 1986.

EARL G. ANDERSON
Official Court Reporter